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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~902~~ 70-31

PORT OF PORTLAND, *et al.*,
Appellants,
v.
UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

SUPPLEMENTAL BRIEF OF APPELLANT CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

Office and P.O. Addresses:
888 Union Station Building
Chicago, Illinois 60606
609 White Building
Seattle, Washington 98101

R. K. MERRILL
WARREN H. PLOEGER
Attorneys for Appellant Chicago, Milwaukee, St. Paul and Pacific Railroad Company

CRAFTSMAN & NET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

TABLES OF AUTHORITY

Table of Cases

Statutes

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SUPPLEMENTAL BRIEF OF APPELLANT CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

PRELIMINARY STATEMENT

This appellant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee), is a party to the main brief filed on behalf of all appellants herein. This separate brief will not repeat matters contained in the main brief, but is filed to more fully explain to the court the ramifications of the Commission's decision denying the Milwaukee's petition for inclusion contingent upon Mil-

waukee's entry to Portland which should have prompted the lower court to enjoin and set aside the Commission's Report and Order of June 6, 1969 and remand the proceedings to the Commission for further consideration.

The additional facts and argument will be limited to the scope of questions presented and the statutes relied upon in the main brief.

STATEMENT

This statement will summarize facts and evidence considered pertinent to an understanding of the Milwaukee's position before the Commission and the court below. Any such understanding requires at the outset a brief review of the history and background of Milwaukee's entry to Portland as a consequence of the Northern Lines merger. All of the railroads involved in the application and petitions for inclusion relating to control of Peninsula Terminal Company (Peninsula) and all of the intervenors were either represented at or parties to the Northern Lines merger proceedings before the Commission. The Commission and all of the parties had knowledge of those proceedings and they were incorporated by reference in Milwaukee's pleadings (App. 181). As will be pointed out later, the purpose of the instant application of SP&S-Union Pacific and its timing has a direct relationship to the anticipated entry of Milwaukee to Portland as a trunk line. The Northern Lines merger proceedings were reviewed by the court and the Commission's decision approving the same was affirmed in *Northern Lines Merger Cases (United States v. I.C.C.)*, 396 U.S. 491, 24 L.Ed.2d 700, 90 S. Ct. 708 (1970).

1. The Northern Lines Merger.

Proceedings on the application under Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)) for approval of the proposed merger of the Northern Lines[1] into a new company originally called Great Northern Pacific & Burlington Lines, Inc. and now called simply Burlington Northern Inc. (BN), and the operation of the Spokane, Portland & Seattle Railroad Company (SP&S) properties by BN under lease, commenced before the Commission in 1961. At that time Rivergate was in the planning stages. The lengthy proceedings which followed are referred to generally as the Northern Lines Merger Cases. The Milwaukee from the outset opposed the proposed merger unless the proposal was modified to subject the new company to certain conditions which it proposed. One of these conditions would require the new company to grant to the Milwaukee entry to Portland and equal joint use of the new company's line of railroad between Longview Junction, Washington and Portland, Oregon, including terminal facilities at Portland, with right to serve industries and to connect with other railroads at Portland and intermediate points between Longview Junction and Portland.

The Northern Lines and Union Pacific vigorously opposed the Milwaukee conditions, Union Pacific being particularly opposed to Milwaukee's Portland entry.

After extensive hearings and briefs, an examiner's report was issued August 24, 1964. The examiner recommended approval of the merger transaction subject to a number of

1. Great Northern Railway Company (GN), Northern Pacific Railway Company (NP), Chicago, Burlington & Quincy Railroad Company (Burlington) and Pacific Coast Railroad Company.

conditions suggested by various parties, some of which had been previously agreed to by the Northern Lines. One of the conditions the examiner recommended was Milwaukee's entry to Portland, an important West Coast seaport and railroad terminal. The examiner's report extensively reviewed the evidence bearing upon this and other conditions proposed by the Milwaukee, as well as the Milwaukee's present and future status as a competitor of the proposed Burlington Northern. The report also considered and made findings with respect to the effect of such conditions upon the proposed Burlington Northern and other railroads, including Union Pacific.

By its Report and Order, decided March 31, 1966 (First Report), a narrowly divided Commission denied the Northern Lines merger proposal, but that report made clear that were the proposal to be approved, most, if not all, of the conditions proposed by the Milwaukee would be required. That decision of the Commission extensively reviewed the artificial and geographical handicaps under which the Milwaukee competed with the Northern Lines throughout the northern tier of states and on the Pacific Coast. It reviewed how the proposed merger would compound these handicaps, all as detailed in the examiner's report.

The First Report found that the Milwaukee provided an essential and efficient rail transportation service in the area where it is the principal competitor of the Northern Lines. It found that Milwaukee's western lines handled an inadequate volume of traffic to sustain this service because (1) its lines did not reach Portland, Oregon, or

Bieber, California as did the Northern Lines, and (2) because the Northern Lines and Union Pacific do not participate in through routes and joint rates with each other or with the Milwaukee at junctions which provide them less than a maximum long haul. Consequently, the Milwaukee could not (without conditions) participate in alternate transcontinental through routes via junctions west of Twin Cities and Missouri River gateways to and from all major west coast terminals, as do all of the other transcontinental railroads terminating on the Pacific Coast. It also found that on north-south traffic, the Milwaukee could not participate in any traffic movements between major west coast cities. It found Milwaukee's participation in substantial movements of transcontinental traffic over its lines west of Twin Cities was limited to that which moved to or from points directly served by its own lines, and that Milwaukee's participation in traffic moving within Mountain-Pacific territory was limited to traffic originating or terminating at local points not served by the Northern Lines. *Great Northern Pac. & B. Lines, Inc., Merger—Great Northern*, 328 ICC 460, 488-500.

On July 27, 1966, the Northern Lines petitioned the Commission for reconsideration of their merger proposal and therein offered to accept all of the conditions sought by the Milwaukee. Before making reply to this petition for reconsideration, the Milwaukee entered into an agreement with the Northern Lines, dated October 24, 1966, spelling out in general terms the conditions offered by the Northern Lines. This agreement was made a part of the record in the proceedings on reconsideration before the Commission in the *Northern Lines Merger Cases* as a form

of stipulation. The agreement[2] was also made a part of the record in the instant proceeding (App. 332-337).

In January of 1967, the Commission reopened the Northern Lines merger proceedings for further hearing and reconsideration. Additional evidence was taken at the further hearings relating to the merger savings in light of the Northern Lines petition for reconsideration and the modifications made to their original proposal. Briefs on reconsideration were filed by several parties and the matter was orally argued to the Commission in June of 1967. The

2. This agreement, so far as it relates to Milwaukee's Portland entry, provides in part as follows:

"1. To the extent that the New Company or SP&S can do so, it will grant to Milwaukee trackage rights over present Northern Pacific and SP&S tracks between Longview Junction, Washington, and Portland, Oregon, including all main, second main, passing and industry tracks . . . with the right to handle freight traffic to or from Longview Junction, Portland, and all intermediate points regardless of origin or destination of said traffic.

• • •

"3. Milwaukee shall have the right to deliver cars to New Company or SP&S, in interchange or for switching at the SP&S yard in Vancouver, Washington and its Hoyt Street freight yard in Portland.

• • •

"5. Milwaukee shall have use of the said SP&S yard in Vancouver and of Hoyt Street freight yard to receive cars in interchange from the New Company, SP&S and any other carrier reaching such yard.

• • •

"11. To the extent that New Company or SP&S can do so, it will at the request of Milwaukee and in a fair and impartial manner perform at joint facility costs the switching of Milwaukee cars at Kalama, Vancouver and Portland to or from industries and connecting carriers to the extent such service is performed by New Company or SP&S for itself or any other carrier.

• • •

"13. Milwaukee shall pay rental for the trackage rights herein granted, including use of Hoyt Street freight yard as a terminal freight yard, its proportion on a user basis of 5% interest of the valuation based on the original cost plus additions and betterments less retirements of said trackage over which Milwaukee performs line haul or switching operations and of succh other freight facilities as are used by Milwaukee, plus a use proportion on wheelage basis of maintenance and operation and taxes of said trackage and facilities."

Milwaukee, on reconsideration, supported the merger, subject to the conditions offered by the Northern Lines.

Thereafter, there was issued the Report and Order of the Commission on Reconsideration and Further Hearing, decided November 30, 1967 (Second Report). That Report approved the Northern Lines merger subject to a number of conditions set forth in Appendix L thereof. *Great Northern Pac. & B. Lines, Inc., Merger—Great Northern,* 331 ICC 228, 352-360. Conditions 23, 24 and 25 (App. 326-328) state the conditions sought by the Milwaukee and agreed to by the Northern Lines.[3] These three conditions were further conditioned by Conditions 9, 13, 17, 19, 20 and 31 of Appendix L. Conditions 20 and 23 were modified by the Second Report on Reconsideration, decided April 11, 1968 (Third Report). *Great Northern Pac. & B. Lines, Inc., Merger—Great Northern,* 331 ICC 869, 879-886, 887.

The Union Pacific, while not opposing the Northern Lines merger, actively opposed certain Milwaukee conditions and in particular Conditions 24(a) at all stages of

3. Condition 24(a) relating to Milwaukee's Portland access reads in part as follows:

"24. At the request of Milwaukee, presented in writing not more than six months after date of consummation of the unification authorized herein or not more than six months after the effective date of any certificate or order of this Commission:

"(a) Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights of the line of NuCo between Longview Junction, Wash., and Portland, Oreg., NuCo shall grant to the Milwaukee, upon such fair and reasonable terms as the parties may agree or as determined by the Commission in the event of their inability to agree, trackage rights to operate freight trains over NuCo lines between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of NuCo facilities at Portland necessary for switching of traffic to other railroads and industries. . . ."

the proceedings before the Commission, as noted in the Commission's Second and Third Reports (331 ICC. 228, 282-283; 331 ICC 869, 872-873). The Union Pacific did not participate in the court review of the Commission's First and Second Reports, as noted in the opinion of the District Court upholding the Commission's approval of the Northern Lines merger. *United States v. United States*, 269 F. Supp. 853, 860 (1969). This court's opinion in the *Northern Lines Merger Cases, supra,* was announced February 2, 1970.[4]

2. Peninsula Terminal

As mentioned in the main brief, Peninsula is an independent terminal railroad whose tracks connect with the Burlington Northern-SP&S main line double tracks extending between Longview Junction and Portland over which the Milwaukee proposed to operate its own trains, engines, cars under its own tariff schedules and billing pursuant to said Condition 24(a). Peninsula's exclusive tracks are physically connected to the BN main lines by a jointly operated, four-track interchange yard at North Portland. North Portland is within the corporate limits and is considered as being within the switching limits of Portland. The interchange yard is known as the North Portland

4. On March 2, 1970, the Northern Lines merger was consummated and Burlington Northern Inc. commenced operation of the combined system. Thereafter, BN and Milwaukee made definitive joint track agreements implementing the trackage rights required by Condition 24, the joint operation and use thereof and for various terminal switching and other services to be performed by BN at Milwaukee's request as stipulated in the above-mentioned agreement of October 24, 1966. These definitive agreements and the operations to be conducted thereunder were submitted to the Commission for approval under Section 5(2) of the Act (49 USC 5(2)) without further public hearing. Approval of the agreement covering Milwaukee's Portland entry was delayed because of protest and subsequent Federal District Court proceedings brought by Union Pacific. However, the Milwaukee commenced operation to and from Portland on March 22, 1971.

interchange. Two of these interchange tracks are owned 50% by Peninsula, 25% by Union Pacific and 25% by SP&S and BN (formerly NP). The other two interchange tracks are owned 50% by Union Pacific and 50% by SP&S and BN (App. 262, 265-267, 368-373).

By agreement of August 31, 1938, as supplemented in 1952 and 1955, one track is used by Peninsula for receiving cars from Union Pacific and SP&S and also from NP and GN; one track is used by Union Pacific for receiving cars from Peninsula and from SP&S, GN and NP; and one track is used by SP&S, GN and NP for receiving cars from Peninsula and Union Pacific; the fourth track is open and is used as a run-around track (App. 265-262).

The three receiving tracks each hold from 30 to 35 cars, or a total of 100 cars at the same time. The tracks are switched twice daily by SP&S, Peninsula and Union Pacific. At the time of hearing, an average of 30 cars per day were interchanged on all of these tracks between all companies, of which from 10 to 20 cars per day were interchanged daily between the trunk lines and Peninsula. The rest of the cars were interchanged between SP&S, GN and NP on the one hand, and Union Pacific on the other. At the time of hearing, by agreement between SP&S and its parent lines under a "car puller" arrangement, SP&S handled cars for the account of GN and NP along with its own from either Vancouver, Washington or the Hoyt Street and Guilds Lake Yards to and from the North Portland interchange track. It will be noted that GN, which had no ownership interest in these interchange yards, interchanged cars at North Portland on the same basis as the owning lines, usually under the above-mentioned car puller arrangement (App. 41, 77, 265-67, 369, 372-73). This

operating arrangement would be taken over by BN but otherwise the physical operation would not be changed by the Northern Lines merger.

Peninsula publishes no tariff of charges for switching cars between the industries it serves at North Portland and the North Portland interchange tracks in connection with line haul movements beyond. Instead, the SP&S, GN, NP and UP publish their line haul rates to and from Portland so as to apply to the industries served by Peninsula. Peninsula is compensated for its switching service by a flat division of the line haul rates set forth in an unpublished division sheet (App. 43, 254-255, 266-267, 284-285). Under this division arrangement, the industries served by Peninsula, insofar as tariff rates and charges are concerned, are treated as if they were local on-line industries of the Union Pacific, SP&S and the latter's parent lines, now BN (App. 468-469). These tariff rate, route and division arrangements would not be changed merely by merger of the Northern Lines.

The Milwaukee and Southern Pacific (SP) provided service to and from Peninsula at the time of hearing under joint routes and rates with Union Pacific or SP&S or either of its parent lines as intermediate carriers over various junctions. SP's nearest junction is East Portland. Prior to Milwaukee's Portland entry, its junctions for Peninsula traffic were outside of Portland, generally Twin Cities, Omaha and other Missouri River gateways, Marengo, Tacoma or Chehalis, Washington (App. 285, 287, 462-468, 534-535).

Peninsula, as an independent company, is neutral in its traffic and operating relations with the trunk lines serving Portland. After it comes under control of SP&S and Union

Pacific, Peninsula policies will be determined by the owning lines (App. 358, 359).

United Stock Yards Corporation (United), the sole stockholder of Peninsula, had Peninsula appraised in 1962 and contacted SP&S in 1963 about selling Peninsula. SP&S did nothing about it at that time, but in 1966 SP&S took a renewed interest in Peninsula, and when Union Pacific learned about it, Union Pacific promptly requested that it be included. A contract with United for the sale of Peninsula's stock jointly to SP&S and Union Pacific was signed February 28, 1967 (App. 255-256, 264-265).

Peninsula's main track extends east and west under the BN north-south double track main line to Portland a distance of about 8,000 feet (App. 250). At the west end is the Port of Portland's Rivergate property (App. 143-144). At the east end is the old Swift & Co. packing plant (App. 273). Crown-Zellerbach, an intervenor in support of appellants in these proceedings before the Commission, has a pole yard at the west end of Peninsula within the boundaries of Rivergate. It has a flexible packaging plant on Peninsula near the said interchange tracks and recently acquired the Swift property for a 200,000 square foot warehouse and ink manufacturing plant (App. 300-301). In all, Peninsula currently serves about 14 industries at North Portland and Rivergate (App. 278).

3. SP&S Union Pacific Plans for Peninsula

As mentioned, the joint application of SP&S and Union Pacific for approval of their acquisition of stock control of Peninsula was agreed to in writing February 28, 1967, but was not filed until July 25, 1967. The joint application

states that such control is in the public interest for the following reasons:

> ". . . the Port of Portland Rivergate Industrial area in North Portland lies one-half mile west of these applicants' physical connection with Peninsula and is reached by the western terminus of the tracks of Peninsula; *that the proposed acquisition will enable applicants to provide rail service to Rivergate over the lines of Peninsula.*" (Emphasis supplied)

It was further stated that the joint applicants intended to continue the operation of Peninsula as a separate carrier and that while no future changes in traffic or revenues were anticipated immediately,

> ". . . *it was anticipated that within the foreseeable future substantial new traffic and revenues will be derived as a result of the development of said River Gate Industrial Area by the Port of Portland Commission.*" (Emphasis supplied)

It was stated that it was applicants' opinion that their operation of Peninsula would be of mutual benefit to the three carriers (App. 143-144).

At the hearing before the examiner, applicants' witness in support of the joint application stated:

> "Reference is made in our application *to extending the service of Peninsula Terminal Company into the Port of Portland's Rivergate industrial area.* However, the questions of whether, when and how far such operations will extend into that area are problematical at this time.
>
> "We realize the existing Peninsula trackage has impaired deficiencies due to excessively heavy curvature, impaired clearances and low standard track structure. In my opinion, sooner or later, with industrial growth in Rivergate, extensive expenditures for alter/n/ation of Peninsula trackage will be necessary in order to adequately serve the area. *In fact, it may prove more*

feasible, even necessary, to serve it by new track access direct from the SP&S main line. In such event, Union Pacific and SP&S have already given the Port written assurance that we would provide joint service similar to that provided now via another connection into the Southwest part of Rivergate." (App. 269) (Emphasis supplied)

On cross-examination, the witness had this to say:

"Q. . . . Am I correct that it is your intention, and by 'your' I mean SP&S and UP, to conduct the operation of Peninsula Terminal with the status quo of the trackage and equipment that presently exists?

"A. That is what we contemplate, yes.

"Q. The development of the Rivergate area will have a decided effect upon that decision, will it not?

"A. It could very likely, yes.

"Q. Haven't you in your plans made some provision for the potential growth of Rivergate area and the use of the Peninsula Terminal as a carrier?

"A. Not exactly, no. The plans for the development of the Rivergate area are long range, and I don't believe that there is any hard, fast plans that have been made. We are flexible.

"Q. But you certainly realize that changes will definitely have to be made in the Peninsula trackage when the Rivergate area opens up, don't you, sir."

° ° °

"A. Yes." (App. 6, Vol. V, Tr. 91-92)

° ° °

"Q. Mr. Westergard, you referred to your plan to have the Peninsula Terminal properties operated by Peninsula Terminal as a short range plan. Can you tell us what your long range plan for operation of the property is?

"A. I wouldn't say we have a long range plan. It is flexible just like all our operation and developments

are, and I think because I stated or said in my statement it's conceivable that it may be used to serve a portion of the Port of Portland Rivergate development, as a matter of fact, it does not now actually serve port property, but the day will come eventually with the development of the port as they hope and anticipate, that Peninsula in its present condition couldn't adequately serve a sizeable development.

"Q. Do you have a tentative plan as to who will be the operator of the properties at that time?

"A. I visualize the Peninsula continuing as is. But the way the trunk line railroads serve Rivergate with a direct access with their own power at least on the basis something like we are doing down at the west end now." (App. 6, Vol. V, Tr. 142-143)

° ° °

"Q. Mr. Westergard, I understand the application asks for the right to buy into Terminal Company and the use of those trackages. I believe that has been established. Does SP&S and UP now have any track rights on terminal itself?

"A. No, sir. We would have to have permission and we would have to apply to the Interstate Commerce Commission for such trackage rights and, in fact, if and when we acquire it we would have to apply to the Commission for such rights, which we are not doing." (App. 386)

SP&S and Union Pacific serve Rivergate from the southwest side by a jointly owned track from Union Pacific's Barnes Yard to the southern boundary of Rivergate. The operation is provided for in a contract dated May 26, 1967. The operation commenced in 1964 but discussion with the Port to provide this connection began in 1958 or 1959. For carrier convenience, the Union Pacific crews and engines switch the cars of both SP&S and Union Pacific to the industries at Rivergate reached by this track to avoid du-

plication of services. GN and NP cars are handled along with SP&S cars under this arrangement. A similar arrangement prevails on the jointly owned track of SP&S and Union Pacific extending from Barnes Yard to Municipal Terminal 4, located south of Rivergate (App. 303-314, 379-380, 380-386).

The SP&S and Union Pacific propose to continue their same rate-making policies as owners of Peninsula, as had previously prevailed (App. 279, 285, 287).

Other railroads would continue to handle traffic to and from Peninsula under a joint rate and through route arrangement. This would mean that Milwaukee would continue to participate in traffic to or from Peninsula via joint rates with either Union Pacific or SP&S or one of the latter's parent lines via existing junctions. The existing junctions on transcontinental traffic so far as Milwaukee is concerned would be Twin Cities or Missouri River gateways and, to a limited extent, via Marengo, Washington in connection with Union Pacific, and on Mountain Pacific traffic and north-south traffic, via Marengo, Tacoma and Chehalis, Washington. UP and SP&S and the latter's parent lines have no existing routes and rates to or from Peninsula in connection with the Milwaukee from or to common points such as Seattle, Tacoma, Spokane, etc. They participate in some routes and rates to or from Milwaukee local non-competitive points via the gateways in the State of Washington (App. 285, 462-468, 534-535).

Union Pacific admitted that its purpose in acquiring ownership of Peninsula jointly with SP&S was to block Milwaukee from obtaining a direct connection with Peninsula at North Portland for interchange of traffic there, and

also from obtaining through Peninsula direct access via North Portland to Rivergate, upon extension of Milwaukee's operations to Portland. By so doing, traffic moving between Milwaukee and Peninsula would require Union Pacific or BN as an intermediate line haul or switching carrier, depending upon the circumstances. These applicants admit this would keep the Milwaukee at a competitive handicap as a trunk line carrier serving Portland so far as North Portland and Rivergate industries are concerned (App. 412, 437-441). They admit that when Milwaukee extends its operations to Portland, Milwaukee would expect to participate in a greater share of traffic to and from Peninsula if its service was equal to the other lines. But without joint ownership of Peninsula and joint use of the North Portland interchange tracks, after Peninsula was acquired by SP&S and UP the Milwaukee would not be on an equal basis with the joint applicants (App. 440). Applicants agree that Milwaukee would be at a solicitation handicap in obtaining traffic to or from Peninsula if SP&S and Union Pacific became Peninsula's sole owners (App. 437).

4. The Milwaukee's Request for Inclusion

The Milwaukee's original petition stated that Milwaukee would soon be a railroad serving Portland and would connect with Peninsula and should be included in the transaction, so that it could serve North Portland and Rivergate on the same basis as that proposed by the BN and UP, as set forth in the joint application, and in order to fully enjoy the same ownership rights in Peninsula as the BN and Union Pacific proposed, it asked that the transaction be conditioned to provide that Milwaukee could have the right to use the intervening North Portland interchange

tracks and physically connect its own operations to Peninsula's exclusive tracks to the same extent as applicants (App. 162-166).

Union Pacific, in its separate answer, asserted that Milwaukee, upon extension of its operations to Portland, would not connect with Peninsula because Milwaukee would be unable to use the North Portland interchange tracks in any manner without the owners' joint consent (App. 177-180). Accordingly, the Milwaukee, assuming this assertion would be proved, by supplement to its petition for inclusion, also requested a Commission order under Section 3(5) of the Act granting use of the North Portland interchange tracks on reasonable terms so as to directly connect its own operations with Peninsula and make interchange there (App. 180-183).

The Milwaukee also petitioned the Commission for a subpoena to require the applicant companies *inter alia* to produce the contract of August 31, 1938 and the supplements thereto, between Peninsula, SP&S, NP, GN and UP, covering the joint use and operation of the North Portland interchange tracks, in order to determine whether there was any legal basis for claiming that Milwaukee would not be a directly connecting trunk line of Peninsula upon its entry to Portland by reason of BN-UP-Peninsula joint ownership of the intervening interchange tracks (App. 184-191). The petition for subpoenas was denied, and the contract was never produced (App. 197, 370-374). The assertion that Milwaukee, upon its entry to Portland, would not be a line directly connecting with Peninsula was never otherwise proved in the case.

The Milwaukee witnesses stated that its officers were authorized to implement the Milwaukee Portland condition

upon consummation of the Northern Lines merger (App. 374, 523). They stated that they proposed to be fully competitive at Portland and to provide rates and service in connection with Peninsula and Rivergate as a Portland trunk line on an equal basis with BN. The Milwaukee proposed to publish joint rates and afford Peninsula divisions, the same as the applicants, thus making Peninsula industries for rate purposes on-line industries of Milwaukee, the same as applicants, without involving switching charges or switching charge absorptions (App. 522, 528, 532-535).

The Milwaukee witnesses stated that under their agreement of 1966 with the Northern Lines, the point of interchange with BN was Hoyt Street, unless similar arrangements could be made to use the Portland Terminal Company's Guilds Lake Yard; that under that agreement BN would at Milwaukee's request switch cars from Hoyt Street Yard at joint facility contract rates to connecting lines' interchange tracks to the same extent as it did for itself, but with respect to Peninsula this would involve a back haul of 8 miles and 24 hours delay in service; that to avoid intermediate handling the Milwaukee preferred to have its road trains pick up and set out cars at North Portland for interchange with Peninsula, but if BN would not permit this because of congestion, it could be arranged to have BN crews transfer them from Vancouver to North Portland as agent for Milwaukee in a puller arrangement in the same manner as SP&S then handled GN and NP cars to and from the North Portland interchange (App. 330-332, 524-526, 529, 571-572).

The Milwaukee witnesses stated that based upon experience, were Peninsula to come under control of BN and Union Pacific, Peninsula would no longer be neutral, but

would be used by SP&S and UP to further their own interests, to the detriment of the Milwaukee and the shippers and receivers served jointly by the Milwaukee and Peninsula (App. 338-343, 522, 526, 530-536).

The applicants suggested that if the Milwaukee's own road trains to and from Portland set out and picked up cars at North Portland, it would be necessary for Milwaukee to construct a fifth interchange track at North Portland (App. 269-270). There is nothing in the record which would suggest this could not be done if necessary.

ARGUMENT

The Commission, in its report here under review, states:

> "With respect to Milwaukee's petition, we wish to point out that this case cannot be viewed as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries there; however, this condition is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by, the Commission. Furthermore, the instant application and Milwaukee's petition for inclusion therein, were not filed until after the record was closed in the *Northern Lines* case, and not until long after the *Northern Lines* applicants had agreed to Milwaukee's request for imposition of condition No. 24. Thus, the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time condition No. 24 was imposed. Milwaukee's inclusion in that purchase cannot, therefore, be considered to implement that condition; and a denial of its petition for inclusion would take nothing from Milwaukee that

it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern Lines* trackage. * * *"

In footnote 10 on the same page, the Commission invited the Milwaukee to reopen the *Northern Lines* case to "determine the relationship of condition No. 24, if any, to Peninsula's tracks." (App. 29).

This approach disregards the fact that Milwaukee's petition for inclusion was generated by the SP&S and UP joint application which would change condition 24(a) substantially unless Milwaukee were included. This wrong approach to Milwaukee's petition led the Commission to say:

> "We cannot conclude, however, that the mere presence of SP, and the prospective presence of Milwaukee, in the general Portland area give them the right to serve all industries anywhere within the undefined geographical area.
>
> "* * *
>
> "Confining our consideration of the terminal area involved to Peninsula, we find that since neither SP nor Milwaukee now connect with Peninsula, and have never connected with it in the past, their direct service to Peninsula's industries over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicant's territory.
>
> "* * *
>
> "The adverse effect on SP&S and UP, and the shippers dependent upon them for service, of admitting SP and Milwaukee into ownership and control of Peninsula, would outweigh any advantage accruing to SP, Milwaukee, and the Rivergate industries of four-railroad ownership" (App. 30, 33)

These conclusions are entirely unsubstantiated and demonstrate a lack of expert analysis of the various issues in the case.

1. Condition 24 of the *Northern Lines Cases* Affords the Milwaukee a Direct Connection with an Independent Peninsula

Upon extension of Milwaukee's operations to Portland in strict accordance with Condition 24, using only BN trackage, Milwaukee would directly connect with Peninsula and be in position to establish joint routes and rates via the North Portland interchange the same as BN and UP. Condition 24 did not limit the arrangements Milwaukee could work out with other carriers at Portland, including Peninsula, once it could operate its own trains and publish its own rates for application via its lines to and from Portland. The agreement of October 24, 1966, between Milwaukee and the Northern Lines provided that Milwaukee could use all BN trackage between Longview Junction and the SP&S Hoyt Street Yard at Portland which the BN had the power to grant for the operation of Milwaukee engines, trains and cars. Peninsula is directly connected to the BN tracks by the jointly owned and operated North Portland interchange tracks.

Unless there was a legal impediment to Peninsula handling Milwaukee inbound and outbound cars over the North Portland interchange tracks, nothing further was needed. There was no evidence that the jointly-used BN-Milwaukee trackage to Portland would not connect with Peninsula's jointly-owned interchange tracks, or that Milwaukee, upon entry to Portland, could not publish its line haul rates to apply to Peninsula industries pursuant to Condition 24(a), the same as SP&S, GN and NP had been doing for years. There was no reason for Peninsula, a neutral terminal road, not to be agreeable to this. The only legitimate objection made was to the use of the North Portland interchange

tracks to set out and pick up cars by Milwaukee's own road crews and engines. It was contended that this type of operation would require the construction of a fifth track on which Milwaukee crews could pick up cars and that this kind of physical operation might create unnecessary congestion at North Portland Junction.

Only Union Pacific asserted Milwaukee would not be able to directly connect with Peninsula one way or another under Condition 24(a) because of its joint ownership interest in the interchange tracks. But its joint ownership in the North Portland interchange yards does not justify the conclusion that Milwaukee would not be able to directly connect with Peninsula under Condition 24. Only if the contract of 1938, as supplemented, covering the joint use of these tracks for interchange, forbade Peninsula from switching to and from Milwaukee over BN and Peninsula's own assigned tracks in the North Portland interchange yard, would Peninsula be prevented from physically connecting with Milwaukee. Such contract provision would be purely anti-competitive. Regardless, that agreement as supplemented was never produced and there is no testimony on the subject. Hence, the assertion that Milwaukee would not directly connect with Peninsula under Condition 24(a) was never proved. The Milwaukee under Condition 24(a) was free to connect with Peninsula at North Portland upon entry to Portland under Condition 24(a).

2. Milwaukee, Under Condition 24, Could Serve Rivergate and North Portland as a Trunk Line Directly Connecting with an Independent Peninsula

Milwaukee's petition for inclusion was not, in the final analysis, based upon its need to physically operate with its own engines and crews upon the North Portland inter-

change were Peninsula to remain independent, although it sought to use those tracks by its own engines and crews under Section 3(5) and as a condition to the transaction proposed. Its petition was based upon the fact that Peninsula, as a joint owner and user of the interchange tracks, did in fact thereby connect with those exclusively-owned BN tracks upon which Milwaukee was to be granted trackage rights by BN under Condition 24. Consequently, neither BN nor Union Pacific would be in any position to stop the Milwaukee from entering into through rates and routes via North Portland with Peninsula were it to remain independent. Under Condition 24(a) the problem was merely the practical method of physically handling the cars over the interchange tracks, not the existence of a physical track connection between Milwaukee and Peninsula.

In this, Milwaukee is aided by Section 1(4) of the Interstate Commerce Act, which requires every common carrier, such as Peninsula and the Milwaukee, to establish reasonable through routes and rates and to provide reasonable facilities for their operation. (49 U.S.C. §1(4)). Section 3(4) of the Act requires all such carriers, according to their respective powers, to afford all reasonable, proper and equal facilities for interchange of traffic between their respective lines, and not to discriminate in their rates and charges between connecting lines. 49 U.S.C. §3(4); *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 149 U.S. 777, 37 L.Ed. 964 (1889). Section 3(5) empowers the Commission to order the use of such terminal tracks as are required for this and other purposes. (49 U.S.C. §3(5)).

The Northern Lines-Milwaukee agreement of 1966 is silent as to points of interchange with other carriers at

Portland, whether for local switching or for through line haul movement. This is not surprising, since the practice is for the receiving line to designate the tracks for delivery of cars for interchange, unless agreed otherwise. BN and Milwaukee could not designate these tracks for the account of other lines. This does not indicate, however, that under Condition 24(a) no Milwaukee interchange would take place with Peninsula at North Portland unless its petition for inclusion were granted. The Commission noted, at page 283 of its Second Report, that other provisions of law would apply to UP-Milwaukee relations as connecting carriers. The same is true for Peninsula.

The physical handling of the cars could be accomplished under various arrangements. One way would be to have BN handle between Hoyt Street and North Portland, as provided for in the October 24, 1966 agreement. Another would be to have Milwaukee's crews and power pick up cars from one of the assigned interchange tracks and make delivery on the assigned Peninsula track. Picking up cars at North Portland interchange tracks by Milwaukee engines and crews could either require the consent of the owning lines or at least the one to whom it is assigned, or require the Milwaukee to construct a fifth track at North Portland on which to receive cars from Peninsula for pickup. A third method would be to have BN handle the cars between Vancouver and North Portland as Milwaukee's agent in a transfer or car puller arrangement. This would eliminate the backhaul between Hoyt Street and North Portland.

How these arrangements would ultimately be worked out has nothing whatever to do with whether the Milwaukee would directly connect with Peninsula at North Portland under Condition 24(a) as prescribed. These are prac-

tical operating problems. The physical connection at North Portland is there for a legal interchange by reason of Peninsula's existing track connections through jointly-owned interchange tracks and Condition 24.

3. The Commission Confused "Trackage" with "Territory" and Changed Condition 24

The confusion into which the Commission was led was caused by a basic misunderstanding of the purpose of the application and Milwaukee's petition for inclusion.

The SP&S and UP stated in their application that they desired to control Peninsula in order for *applicants* to use it as an access to Rivergate. This could be and was interpreted two ways: (1) that Peninsula service in connection with BN and UP would be extended to Rivergate over Port-owned tracks; or, (2) that the owners could have Peninsula grant to the owners running rights over Peninsula tracks to the Port tracks in Rivergate, for operation by the owners upon Port tracks. In either case, the owning trunk lines could operate the Port tracks jointly, one method using Peninsula as their agent, the other, without using Peninsula service, but only tracks, the same as is done in the southwest part of Rivergate where SP&S (BN) has its entry via UP's Barnes Yard tracks. In either case, the switching of Peninsula's existing industries by Peninsula would not be changed. Peninsula, whether independent or carrier owned, could also extend its operations to Rivergate as a separate connecting common carrier.

The Milwaukee sought inclusion as a joint owner in order to have all of these same options preserved to it. It sought, under Sections 5(2)(b) of the Act, use of the North Portland interchange tracks for its own power and

crews so as to be on an equal basis with BN and UP in case the owners decided to operate with the owners' power and crews into Rivergate over Peninsula tracks. Such a choice would not necessarily involve duplication of service where the parties, as the various agreements in this case indicate is normal and usual, agree upon a division of work to avoid duplication of switching. Under Section 3(5) of the Act this use of the interchange by Milwaukee, of course, would also have removed all doubt about whether Milwaukee road crews and engines could set out and pick up at North Portland. The applicants, on the other hand, indicated at the hearing that they thought they needed Commission authority to operate to Rivergate over Peninsula tracks, although there is some doubt about that. The applicants at the hearing indicated, however, that they proposed to have Peninsula services extended to Rivergate for the foreseeable future rather than seek trackage rights over Peninsula or constructing a new track into Rivergate. This could be as the owners' agent or as a separate common carrier.

Apparently, the Commission thought the Milwaukee's petition for inclusion was an attempt in this case to gain direct access to North Portland and Rivergate by operating its own engines over Peninsula's tracks. This is contrary to Milwaukee's various pleadings and testimony. The Commission thought this use of Peninsula trackage would give Milwaukee direct access to territory at North Portland and Rivergate which would not otherwise be available at North Portland via an independent Peninsula under Condition 24. To the contrary, in the event Peninsula came into the hands of SP&S and UP without including the Milwaukee it would foreclose Milwaukee's equal access to Peninsula territory. If the transaction were approved and Milwaukee

were included, the Milwaukee would get nothing more than applicants would attain from ownership of Peninsula. The Commission, in reversing the examiner reversed the entire field, and disregarded the main purpose of the application by SP&S and UP.

4. Applicants Intended to Block Milwaukee's Portland Entry

Applicants admitted that their joint ownership of Pensula was filed in order to block the Milwaukee from establishing routes and rates with Peninsula via North Portland, which was otherwise inherent in Condition 24(a) when implemented. They admitted that once they had control of Peninsula without inclusion of Milwaukee, the Milwaukee would thereafter be at a competitive handicap at Portland because Rivergate was the last remaining industrial area at Portland. The admission that Milwaukee would not be able to participate in as much business at Portland if joint applicants controlled Peninsula as would be the case if it remained independent, in and of itself is an admission by joint applicants that implementation of Condition 24(a) would give Milwaukee direct access to an independent Peninsula, and a means to provide service to North Portland and northeast Rivergate on the same basis as joint applicants.

The peculiar fact that Peninsula does not publish switching charges, but instead the trunk lines' linehaul rates apply to Peninsula industries under a divisional arrangement, has ramifications never considered by the Commission in its Report.

As the Commission pointed out in its First Report in the *Northern Lines Merger Cases*, the Northern Lines and

Union Pacific do not participate in joint rates and routes which afford less than a maximum haul. The joint applicants stated that this policy would be followed in connection with their ownership of Peninsula. This is the policy that resulted in the inadequate volume of traffic via the Milwaukee, holding its participation to traffic to and from its local points only on the north-south and Mountain-Pacific traffic. This is the policy that prevented Milwaukee from participating in traffic between major west coast cities, such as between Spokane, Seattle or Tacoma, Washington, on the one hand, and Portland, Oregon, on the other. This is the rate policy that prevented Milwaukee from being a rate-making line to Portland and discouraged the publication by Milwaukee of joint rates to and through Portland because it was forced to use short haul off-junctions with nothing in the return direction. It is this policy which joint applicants say they will extend to Peninsula and preserve for the future. It is this policy which the Commission perpetuated for the Milwaukee, by approving joint control of Peninsula by BN and UP, without including the Milwaukee, and by prescribing the conditions on page 436 of its Report (App. 35).

The timing of the application and the Commission's decision thereon of June 6, 1969 is such that the existing traffic and operating relationships and existing routes and rates do not include routes and rates then yet to be established between the Milwaukee and Peninsula under Condition 24(a) in the *Northern Lines Merger Cases*. Consequently, Milwaukee's Portland entry can be largely defeated by the Commission's decision in this case.

Moreover, once the SP&S and UP get control of Peninsula, Peninsula will no longer be required to establish

rates which short haul its parent lines, because Peninsula will be under common control and management of the owners. The Commission, in some other proceeding, would be powerless to require Peninsula to open North Portland to Milwaukee as a junction. In *Chicago, Milwaukee, St. Paul & P. R. Co. v. United States,* 366 U.S. 745, 6 L.Ed.2d 772, 81 S. Ct. 1630 (1961), commonly called the *Spokane Gateway Case,* this court held that the Commission was without power under Section 15(3) of the Act to require a carrier under common control of two other railroads (as was the SP&S under control of GN and NP) to participate in joint through rates with another (the Milwaukee) which short hauled the parent lines, without a showing of necessity as required by Section 15(4).

5. The Application Was Filed with the Intent to Reduce the Territorial Scope of Milwaukee's Portland Entry Before It Became Effective

The applicants did not wait until long after the *Northern Lines Merger Cases* were closed before filing their application. They recognized that when the Northern Lines offered all of Milwaukee's conditions, they had to move in on Peninsula before the merger was consummated and Condition 24(a) implemented if they were to block Milwaukee from North Portland and Rivergate served by Peninsula. They finalized their arrangements with United only three months after the Northern Lines-Milwaukee agreement was reached with respect to the Milwaukee conditions. They waited until after oral argument on reconsideration to file their application and make public their plans. Their intent was to reduce the Portland territory available to Milwaukee under Condition 24. Commission denial of the application would have retained the

status quo pending implementation under Condition 24. Inclusion of the Milwaukee would have assured to the Milwaukee with BN at North Portland and Rivergate for the future. Equality

6. Milwaukee's Petition for Inclusion Did Not Involve Joint Union Pacific-SP&S Territory

The Commission considered Milwaukee's petition as an invasion of territory. The fact is that Condition 24(a) provided the basis for the invasion of Peninsula territory. Entry into Portland as a trunk line carried with it the right to maintain Portland as a junction and point of interchange with all other carriers there, including terminal railroads and other trunk lines, whether they published joint line haul rates with connecting roads via Portland or intermediate points between Longview Junction and Portland, or published connecting line switching charges for switching to their industries. It also carried with it the right to negotiate the necessary physical arrangements to carry this out and to apply to the Commission or the courts under other sections of the Act when the public interest required or violations of law were practiced. Peninsula was not owned or operated by SP&S or UP and upon Milwaukee's entering Portland Peninsula would have had the same relationship to the Milwaukee as with BN and UP.

The joint application was the moving cause for Milwaukee's petition for inclusion. The SP&S-UP proposal would have severely limited the expected public benefits from Milwaukee's Portland entry. Milwaukee's inclusion would have preserved these benefits. The Commission turned this around as if the Milwaukee either sought to obtain something it would not otherwise have had or sought some-

thing which joint applicants did not seek for themselves by their application.

7. The Commission Shifted the Burden of Applicants to Milwaukee and to the *Northern Lines Merger Cases* by Treating Milwaukee's Defensive Petition for Inclusion as a New Application

In view of the direct relationship between the intent of the joint application and the Commission's expressed intent in Condition 24 previously agreed upon, and the logical results flowing therefrom, the Commission, instead of denying Milwaukee's inclusion, should have denied the joint application or included the Milwaukee. Instead, the Commission, by footnote to its Report, shifted the burden of showing the relationship between Condition 24(a) and Peninsula trackage ~~him~~ the Milwaukee in a proposed reopening of the *Northern Lines Merger Cases*.

This is not a mere change in procedure. The decision results in a change in Condition 24(a) as sought by joint applicants in this collateral proceeding, and then requires the Milwaukee to challenge the decision in the *Northern Lines Case*. It is SP&S and Union Pacific who should be required to seek modification of Condition 24(a) in the *Northern Lines Case* if it was thought this Milwaukee condition should be restricted or conditioned with respect to North Portland or Rivergate territory served or to be served by Peninsula. There are several conditions set forth in Appendix L to the Commission's Second and Third Reports in the *Northern Lines Merger Cases* which apply to and restrict the implementation of Condition 24. That is the proceeding where joint applicants should have tried to exclude Milwaukee from Peninsula territory.

The Milwaukee sought no interpretation of Condition 24 in the instant case. Milwaukee opposed the application unless included as a joint owner. The Commission could have dismissed the joint application without prejudice or held it in abeyance until the applicants modified or clarified Condition 24(a) in the *Northern Lines Case*.

Instead, the Commission collaterally modified Condition 24. Despite the Commission's statement that it took nothing from Milwaukee, it gave joint applicants a tool by which to control Milwaukee's Portland entry.

8. The Commission Used the Wrong Legal Criteria in Failing to Consider the Effect of Its Decision Upon Condition 24 Prescribed in the Northern Lines Merger

Section 5(2)(c) of the Act requires the Commission to give weight to the effect of the proposed transaction upon adequate transportation to the public. The Commission ignored the future interests of shippers and receivers of freight at numerous stations on Milwaukee, as well as those on the tracks of Peninsula at North Portland and as served by Peninsula in Rivergate. The Commission had no evidence that Milwaukee's mere inclusion in the instant transaction would result in a loss of traffic by joint applicants which would not be the case upon Milwaukee's entry to Portland, were Peninsula independent. To the contrary, the evidence is that Milwaukee would lose potential traffic expected under Condition 24 by approval of the transaction unless included.

The Commission is required to weigh not only the effect of inclusion upon the public interest, but also the effect of failure to include other carriers. The Commission focused only upon the *status quo* as of the time the application was

filed. It stuck its head in the sand, ignoring the effect of its decision upon the proposed service by Milwaukee in the foreseeable future already forecast in the *Northern Lines Merger Case.* In fact, the ends to be achieved by the Northern Lines merger, which by reference were also made the law of the case by Milwaukee's pleadings in this collateral proceeding, should have governed the result in this case.

SUMMARY

The Commission, instead of viewing the application of SP&S and Union Pacific as an effort to obtain control of Peninsula independently of the *Northern Lines Merger Cases* and Condition 24(a), should have considered how the application would affect its prior findings and order which broadly fixed the relationship of the parties for the future. It should not have approved this collateral modification of Condition 24 until it is determined how its approval would affect the earlier decision and Milwaukee's relationship to Peninsula and its tracks under Condition 24. This it did not do. In short, the Commission considered how the petition for inclusion would affect the applicants and their shippers and made a presumption they would lose something, but never made any findings as to how the transaction approved would affect the Milwaukee and its shippers and its ability to provide service to the public, upon extension of its operations to Portland.

The decision disregarded the benefits of rail competition throughout the northern tier of states and the western states and the need for service to and from Rivergate and North Portland on a competitive basis from the entire area. Instead, it concentrated on the trackage and territory of Peninsula in relation to SP&S and UP. The Commission was wrong in concluding that Milwaukee, by its petition for inclusion, merely sought to expand Condition 24(a) and thereby invade new territory—territory that was not ever served directly by UP or BN, but by an independent Peninsula. Milwaukee never sought to switch cars to Peninsula industries with its own engines and crews. It only sought to preserve to itself and the public the rights and service promised by implementation of Condition 24(a).

were Peninsula to remain independent, and such additional rights and benefits as the joint owners might in the future enjoy by reason of the proposed transaction.

This basic error cannot be corrected in another proceeding. The Commission has no jurisdiction over Union Pacific, one of the joint applicants, or over Peninsula, in the *Northern Lines Merger Cases* because they were neither applicants nor parties seeking conditions in that case. Once consummated, the present transaction cannot be corrected by the Commission to establish Peninsula as a railroad connecting with the Milwaukee at North Portland without the owners' consent.

Respectfully submitted,

R. K. MERRILL
WARREN H. PLOEGER
Attorneys for Appellant
Chicago, Milwaukee, St. Paul and Pacific Railroad Company